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No. 300.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

UNITED STATES OF AMERICA,
Petitioner,

v.

GENERAL ENGINEERING AND MANUFACTURING COMPANY, a Corporation, Debtor.

BRIEF

Of Respondent in Opposition to the Petition for a Writ of Certiorari.

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Of Respondent in Opposition to the Petition for a Writ of Certiorari.

QUESTION PRESENTED.

Whether, in an arrangement proceeding under Chapter XI of the Bankruptcy Act, the United States is entitled to interest on unpaid taxes for the period following the date of the filing of the petition for arrangement.

STATUTES INVOLVED.

The pertinent statutory provisions are printed in the Appendix.

STATEMENT.

Petitioner's summarized statement of the facts is accurate and complete.

REASONS FOR DENYING THE PETITION.

1. In *City of New York v. Saper*, 336 U. S. 328, the issue before the court was whether the Government is entitled to interest on tax claims for the period subsequent to the time of the filing of a petition in bankruptcy. The court made a thorough analysis of the pertinent provisions of the Bankruptcy Act[1] and the amendments thereto and affirmed the Appellate Court decisions denying such post-bankruptcy interest.

The opinion of the Supreme Court in the Saper Case forms the basis of the decisions of the Referee in Bankruptcy, the District Court and the Eighth Circuit Court of Appeals in favor of the debtor in the case now under consideration. As is illustrated in each of these three opinions, the provisions of the Bankruptcy Act which the Supreme Court considered in the Saper Case and which were held to deny post-bankruptcy interest on tax claims are fully applicable to the issue presented by the instant case and indeed are determinative of this issue. The Saper decision rests principally upon the provisions of Sections 57 (n), 63 and 64 (a) of the Bankruptcy Act (Appendix pp. 7-9) and the changes made in Sections 57 (n) and 64 (a) by the 1926 amendment and the Chandler Act of 1938. In the opinion of the Eighth Circuit Court of Appeals, 188 F. 2d 80, 83, Judge Sanborn discussed the provisions of these particular sections and concluded that they are applicable to a proceeding under Chapter XI:

> "It seems obvious to us that all of the sections of the Bankruptcy Act upon which the Supreme Court relied in the Saper Case in demonstrating that tax claims in bankruptcy proceedings are debts and that

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1 Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended by the Chandler Act of June 22, 1938, c. 575, 52 Stat. 840, 11 U. S. C., sec. 1 et seq.

interest upon them is allowable only to the date of bankruptcy are equally applicable to proceedings for an arrangement under Chapter XI."

2. The first argument asserted by the Government in its supporting brief is based on the provisions of the Internal Revenue Code, which provide that where taxes are not paid when due, interest shall be added until date of payment. This argument was made in the Saper Case and was there expressly rejected on the ground that the provisions of the Internal Revenue Code were never intended to govern the operation of the Bankruptcy Act. (See footnote 18 on page 340 of the Saper opinion.) The Government does not state why these taxing statutes should be held to override the provisions of Chapter XI, which is itself a comprehensive arrangement statute, and incorporates into its operation the very provisions of the Bankruptcy Act under consideration in the Saper Case.

3. The second ground on which the Government relies in seeking certiorari is the assertion that denial of this claim to post-petition interest on tax claims violates the "absolute priority" rule. This argument was presented at length by the Government to the Referee in Bankruptcy and in the District and Appellate Courts. All found it to be inapplicable to the claim for interest which the Government presented in this proceeding. Other courts have likewise rejected this argument where it has been asserted as guaranteeing to the taxing authority a right to payment of post-petition interest on tax claims. The Fourth Circuit Court of Appeals did so in *United States v. Edens*, 189 F. 2d 876, in which case the Government is seeking certiorari concurrently herewith. The First Circuit Court of Appeals rejected it in *Massachusetts v. Thompson*, 190 F. 2d 10, which case involved a Chapter XI proceeding.

In the brief in support of the request for the writ counsel for the Government do not state with clarity just why

they consider the rule of absolute priority to require a reversal of the Appellate Court's judgment affirming the order denying the Government's claim for post-petition interest.

The Government cites no case wherein it is held that the absolute priority rule is applicable to post-petition interest on unsecured tax claims in Chapter XI proceedings. A substantial part of the argument presented in its brief is based on the provisions of Chapter X and cases decided under that Chapter and its predecessor, Section 77-B. The Government itself cites the case which makes such an approach unsound. *Securities and Exchange Commission v. U. S. Realty Company*, 310 U. S. 434, considered and expounded in detail the very marked differences between these two independent statutory procedures, both as to express provisions and in general purpose. These important distinctions formed the basis of the decision in that case holding that the Chapter XI proceeding had been improperly instituted.

Even the Government's unsupported assertions concerning the absolute priority rule fail to illustrate why the rule would require the payment of the post-petition interest which is demanded. General statements to the effect that Chapter XI is designed for the rehabilitation of the debtor rather than for bankruptcy liquidation are unimpressive when asserted to contradict the provisions of Sections 63 and 64 of the Bankruptcy Act, which are incorporated into Chapter XI to govern such important considerations as what constitutes a provable debt and which debts have priority.

In the course of its argument based on the absolute priority rule, the Government disregards three facts which were considered by the Referee and the District and Appellate Courts and which have great significance in this case. First, the Government's tax claims constitute only

one of the several varieties of claims which enjoyed priority in this proceeding. Section 64, upon which the Government must and concededly does rely (see the footnote at page 9 of its brief) to establish priority for its tax claims, also grants priority to a number of other categories of claims. Consequently the Government's position is not unique and no special consideration for the Government or for its tax claims can be derived from this priority, which is shared by a number of other creditors, most of whom do not possess the attributes of sovereignty. Second, under the provisions of the arrangement which has been confirmed and consummated, none of these priority creditors or any others affected by the arrangement received post-petition interest. As in the case of the Government's tax claims, such interest was uniformly denied. Third, the retention by the Debtor of $135,000 worth of shaper inventory, to which the Government objects, was one of the provisions of the arrangement which was accepted by the required number of creditors, to which no objections were filed and which was confirmed on September 13, 1949 (R. 10). No appeal was taken from the order confirming the arrangement, and this order constitutes a final judicial determination that the arrangement and all of its provisions are fair and equitable within the requirements of Section 366 (3) of Chapter XI. (Appendix, p. 9).

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE C. WILLSON,
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October, 1951.